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IN THE

Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

PAUL HOLOWECKI, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit this brief as *amici curiae*.[1] Letters of consent from both parties have been filed with the Clerk of the Court. The brief supports the petition for a writ of certiorari.

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 315 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's members and many of the Chamber's members are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, as well as other equal employment laws and regulations. As employers, and as potential respondents to charges of age discrimination under the ADEA, EEAC's and the Chamber's members have a significant interest in the issues raised by the Petition for Writ of Certiorari.

EEAC and the Chamber seek to assist the Court by highlighting the impact its decision in this case will have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant

matters that have not already been brought to its attention by the parties. Because of their experience in these matters, EEAC and the Chamber are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Patricia Kennedy worked as a courier for Federal Express Corporation (FedEx). Pet. App. 4a. In December of 2001, Kennedy filled out an Equal Employment Opportunity Commission (EEOC) intake questionnaire and submitted it to the agency along with a four-page, signed affidavit, alleging that FedEx's new performance standards discriminated against older workers. Pet. App. 8a.

The EEOC took no action in response to Kennedy's intake questionnaire. Pet. App. 39a. It did not notify FedEx that a charge had been filed and did not assign a charge number. *Id.* Nor did the agency investigate Kennedy's allegations. *Id.* Several weeks later, Kennedy filed an ADEA class action lawsuit along with a group of other FedEx employees—including Paul Holowecki, the lead plaintiff in the case. *Id.* at 18a, 38a. Only after initiating suit did Kennedy file a formal charge of discrimination with the EEOC. *Id.* at 33a.

Holowecki and the other plaintiffs argued that Kennedy's intake questionnaire constituted a valid charge upon which they could "piggyback" their claims. *Id.* at 12a. A federal trial court dismissed the lawsuit, however, ruling that Kennedy's intake questionnaire was not "the equivalent of a charge" and, therefore, the plaintiffs' claim was untimely because it was filed one month after suit had been filed. *Id.* at 39a.

On plaintiffs' appeal, the Second Circuit reversed, concluding that Kennedy's intake questionnaire constituted a valid EEOC charge, even though the EEOC never treated it as

one and Kennedy later returned to the agency to file a charge. *Id.* at 20a. While the ADEA requires an individual to file a timely charge with the EEOC before bringing suit, the Second Circuit ruled that the regulatory requirements are "minimal" and, therefore, any minimally sufficient intake questionnaire would suffice as a charge so long as it "manifest[s] an individual's intent to have the agency initiate its investigatory and conciliatory process." *Id.* at 14a-15a. Because Kennedy's questionnaire contained full contact information for the employer and provided information about alleged violations of the ADEA, the court concluded that it satisfied the statutory and regulatory requirements for the content of an ADEA charge, even though FedEx never received notice of the charge. *Id.* at 18a. Moreover, the "forceful tone" of the questionnaire and affidavit communicated Kennedy's "intent to activate the [EEOC's] administrative process," the court said. *Id.* at 19a.

FedEx filed the instant Petition for Writ of Certiorari on March 30, 2007.

SUMMARY OF ARGUMENT

Congress expressly provided that individuals claiming a violation of the ADEA are required to exhaust administrative remedies by filing a charge of discrimination with the EEOC prior to initiating suit in federal court. 29 U.S.C. § 626(d). The important purpose behind this statutory requirement is to provide the EEOC "with an opportunity 'to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance . . . .'" Pet. App. 15a.

There is a sharp division among the circuit courts of appeals as to whether a discrimination plaintiff satisfies this charge filing requirement simply by completing an EEOC "intake questionnaire"—a form used by the agency to facilitate pre-charge interviews with prospective claimants. In most cases, as the case was here, the EEOC does not notify

the employer when an intake questionnaire is received or otherwise treat the form as a charge.

While some courts are willing to recognize an intake questionnaire as a charge in the fairly unusual situation where the EEOC actually processes the questionnaire as one, they do not agree on whether the submission of an intake questionnaire accomplishes a charge filing when the agency does not provide notice to the employer or treat the questionnaire as a charge. At least one court has suggested that *any* intake questionnaire submitted to the EEOC is a charge, for example, while another has said an intake questionnaire can *never* be a charge. *Compare Casavantes v. California State Univ.*, 732 F.3d 1441, 1443 (9th Cir. 1984) *with Dorn v. General Motors Corp.*, 131 Fed. Appx. 462 (6th Cir.), *cert. denied*, 546 U.S. 937 (2005). Other courts have ruled that an unserved, unprocessed intake questionnaire may only function as a filed charge if the EEOC misled the plaintiff about the status of the questionnaire. *See e.g.*, *Perkins v. Silverstein*, 939 F.2d 463 (7th Cir. 1991); *Steffan v. Meridian Life Ins. Co.*, 859 F.2d 534 (7th Cir. 1988); *Diez v. Minnesota Mining & Mfg. Co.*, 88 F.3d 672 (8th Cir. 1996); *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314 (11th Cir. 2001). The Second Circuit has applied an entirely new standard that would render an intake questionnaire a filed charge any time the questionnaire purports to "communicate[ ] [the employee's] intent to activate the EEOC administrative process," no matter what representations the EEOC may have made concerning the status of the questionnaire and regardless of whether notice was ever provided to the employer. Pet. App. 18a.

Guidance from this Court therefore is needed to determine when (if ever) the mere submission of a completed intake questionnaire will satisfy a plaintiff's charge filing requirements. The question is of significant importance to employers because in the absence of a formal charge, the agency will not notify the employer of the allegations or provide an

opportunity to reach a voluntary resolution. Under the Second Circuit's rule, a plaintiff who failed to file a valid EEOC charge will be permitted to litigate in federal court, even if it means the employer's first notice of alleged discrimination comes when it is served with a civil complaint.

In addition to frustrating the EEOC's investigation and conciliation goals, the decision below thus unduly hampers employer-respondents' efforts to address and resolve potential discrimination in a manner that is quick, effective and mutually beneficial. Indeed, it encourages, rather than discourages, lengthy litigation.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW OF THE DECISION BELOW TO RESOLVE THE SPLIT AMONG THE CIRCUIT COURTS OF APPEALS ON THE QUESTION OF WHETHER THE MERE ACT OF SUBMITTING TO THE EEOC A PRE-CHARGE "INTAKE QUESTIONNAIRE" WILL SATISFY THE ADEA'S CHARGE FILING REQUIREMENTS WHEN THE AGENCY DOES NOT TREAT THE FORM AS A CHARGE

As one of the premier federal civil rights enforcement agencies, it is the Equal Employment Opportunity Commission's mission to prevent and correct unlawful employment practices, which it does through investigation, voluntary settlement and conciliation and, in extraordinary instances, litigation in the public interest. Where an individual suspects unlawful employment discrimination has occurred, he or she is required to first exhaust administrative remedies by filing a charge of discrimination with the EEOC.

The dispute in this case centers on whether an age discrimination plaintiff can satisfy the ADEA's charge filing requirement simply by completing an EEOC "intake ques-

tionnaire"—a form used by the agency to facilitate interviews with potential charge filers. Many thousands of prospective claimants complete intake questionnaires each year, although not all of them ultimately decide to file a charge. Moreover, because of the preliminary nature of the questionnaire, the EEOC will not notify the employer or conduct an investigation when an intake questionnaire is received, as it does when a charge is filed. Guidance from this Court therefore is needed to determine when (if ever) the mere submission of an EEOC intake questionnaire will accomplish a charge filing.

A. Under EEOC Procedural Rules, "Intake Questionnaires" Generally Are Not Processed As Charges

Although the EEOC's charge intake process can vary from office to office, all offices generally follow certain basic procedures. When a potential charge filer first approaches the EEOC, he or she typically will be asked to fill out an "intake questionnaire" or a "Form 283." EEOC Compl. Man. § 1.7, Office Visitor Requests (June 2001). The intake questionnaire serves as a "preliminary device" designed to help an EEOC investigator, or other agency staff who perform charge intake functions, conduct an intake interview—the next step in the intake process.[2] *Id.* During the interview, EEOC staff will determine whether the person's complaint falls within the agency's jurisdiction, and possibly prepare a charge on an EEOC "Form 5" charge form. *Id.* at § 2.5, Drafting the Charge/Complaint (Oct. 2002). Once an individual signs the charge form, the agency will assign a charge number and

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[2] The form itself states that the information provided is "used by Commission employees to determine the existence of facts relevant to a decision as to whether the Commission has jurisdiction over allegations of employment discrimination and to provide such charge filing counseling as is appropriate." EEOC Compl. Man. § 1 (June 2001) (EEOC Form 283, Charge Questionnaire, Exh. 1-B).

serve "prompt" notice to the employer (or notice within ten days if the charge alleges violations of Title VII or the ADA). *Id.* at § 2.7, Docketing and Disposition of Charges/Complaints (Aug. 2002) and § 3.1, Introduction (June 2001).

When an intake interview reveals that the agency has no jurisdiction over a complaint, however, EEOC intake staff will counsel the individual or make a referral. *Id.* at § 1.7, Office Visitor Requests (June 2001) and § 2.4, Pre-Charge Counseling (Aug. 2002). An individual might also choose not to pursue a claim over which the agency does have jurisdiction. *Id.* at § 1.7, Office Visitor Requests (June 2001). In situations where the prospective charge filer ultimately decides not to pursue a claim, the agency will place the intake questionnaire in a "suspense file" where it remains until it is eventually discarded. *Id.* at § 1.7, Office Visitor Requests (June 2001) and § 2.7, Docketing and Disposition of Charges/Complaints (Aug. 2002). No notice is given to the employer, and no investigation is conducted.

Accordingly, under the EEOC's procedural rules, intake questionnaires generally are not treated as charges, and the agency does not routinely investigate them.

B. The Federal Circuit Courts Of Appeals Disagree On Whether, And Under What Circumstances, The Submission Of An EEOC Intake Questionnaire Might Be Sufficient To Accomplish A Charge Filing

Whether an individual can satisfy the ADEA's charge filing requirement simply by filling out an intake questionnaire is a question that has divided the federal courts of appeals. Generally speaking, courts appear willing to recognize an EEOC intake questionnaire as a filed charge in the relatively rare situation when a questionnaire both satisfies EEOC regulations concerning the sufficiency of charges and *the agency actually processes the form as a charge*. *See*

Clark v. Coats & Clark, Inc., 865 F.2d 1237 (11th Cir. 1989) (plaintiff's intake questionnaire could serve as a charge of discrimination where the questionnaire contained the information needed to support a charge and the EEOC treated it as such by serving notice on the employer); *Philbin v. General Elec. Capital Auto Lease, Inc.*, 929 F.2d 321 (7th Cir. 1991) (EEOC intake questionnaire would suffice as a charge where the agency assigned it a charge number and promptly notified the employer that a charge had been filed); *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74 (5th Cir. 1982) (the fact that the EEOC initiated the enforcement process in response to its receipt of plaintiff's completed charge intake questionnaire is "relevant" to the question of whether a charge had been filed with the agency).

Where the EEOC did not treat the plaintiff's intake questionnaire as a charge, however, the courts have taken varying approaches. At one end of the spectrum, the Ninth Circuit has suggested *any* intake questionnaire can be considered a charge filed with the agency, regardless of how the EEOC actually treats the form. *Casavantes v. California State Univ.*, 732 F.2d 1441, 1443 (9th Cir. 1984) (completed intake questionnaire providing "'a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of'" sufficient to constitute a charge). At the other end, the Sixth Circuit has said an intake questionnaire that is neither served on the employer nor investigated by the agency constitutes an "inquiry or complaint," but is not a filed charge. *Dorn v. General Motors Corp.*, 131 Fed. Appx. 462, 470 n.7 (6th Cir.), *cert. denied*, 546 U.S. 937 (2005). In the *Dorn* case, the EEOC did not act on the plaintiff's intake questionnaire or notify the employer of the allegations until the plaintiff submitted a signed EEOC charge form almost a year later. *Id.* at 470.

Other appellate courts have rejected both of these views, recognizing intake questionnaires as filed charges only in

limited situations. The Seventh Circuit has said, for example, that an intake questionnaire might satisfy the charge filing requirement if: 1) "the information contained in the questionnaire [is] sufficient to constitute a charge"; and 2) both the EEOC and the plaintiff indicated "they would treat the questionnaire as a charge," even if the agency ultimately failed to do so. *Perkins v. Silverstein*, 939 F.2d 463, 470 (7th Cir. 1991). In other words, the Seventh Circuit will recognize an intake questionnaire as a charge to avoid penalizing a plaintiff for the EEOC's failure to accomplish a timely filing when the agency promised to do so. Accordingly, in a case where an EEOC intake official mistakenly told one plaintiff that filing an intake questionnaire would preserve the plaintiff's private suit rights, the Seventh Circuit determined that the questionnaire amounted to a charge filed with the agency. *Steffan v. Meridian Life Ins. Co.*, 859 F.2d 534, 544 (7th Cir. 1988). At the same time, the Seventh Circuit will not recognize an intake questionnaire as a filed charge where the EEOC does not treat the questionnaire as one and, in fact, advises the plaintiff more information is needed to file a claim. *Perkins*, 939 F.2d at 470.

The Eighth Circuit took a similar position in a case involving a state administrative agency's intake form. In *Diez v. Minnesota Mining & Manufacturing Co.*, 88 F.3d 672 (8th Cir. 1996), the court concluded that an intake questionnaire would only serve as a charge of discrimination if the plaintiff intended the questionnaire to be a charge and the agency led him to believe that it would be. *Id.* at 677. Likewise, in *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314 (11th Cir. 2001), the Eleventh Circuit ruled that the plaintiff's intake questionnaire satisfied the charge filing requirement because the plaintiff "manifested her intent" to file, reasonably believed the EEOC would accomplish a timely filing, and eventually succeeded in "prodding" the agency to process the questionnaire as a charge. *Id.* at 1321.

Where there is no evidence to suggest that the plaintiff intended the intake questionnaire to function as a charge, however, or that the EEOC gave the plaintiff false assurances concerning the status of the questionnaire as a charge, the Eleventh Circuit has concluded that the form will not operate as one. In *Bost v. Federal Express Corp.*, 372 F.3d 1233 (11th Cir. 2004), a case that parallels this one in virtually every respect but the outcome, the court ruled that the ADEA plaintiffs had "impermissibly bypassed the administrative process" by filing suit in court before initiating an administrative charge with the EEOC. *Id.* at 1241. Like Kennedy, the lead plaintiff in *Bost* provided the agency with a completed intake questionnaire and affidavit, but then failed to communicate further with the agency. *Id.* at 1236. Five months later, Bost and five "piggybackers" filed suit against the company, notwithstanding the fact that the EEOC never treated the intake questionnaire as a charge or provided notice of the claim to the employer. *Id.* A month after filing suit, Bost returned to EEOC to complete an EEOC charge form, which the agency then docketed and served on the employer. *Id.*

Unlike the Second Circuit in this case, however, the Eleventh Circuit in *Bost* affirmed dismissal of the plaintiffs' suit. Is so ruling, the court reasoned that the EEOC had not treated the questionnaire as a charge, and the plaintiff had offered no evidence of misleading communications by the EEOC concerning the status of the submission. *Id.* at 1240. Moreover, the court pointed out, "[i]f Bost believed that he had filed a charge of discrimination when he filed the intake questionnaire, he would not have filed an additional timely charge of discrimination" after the lawsuit was filed. *Id.* at 1241. Accordingly, the court ruled, Bost's suit was "premature." *Id.* at 1243.

The Second Circuit has applied an entirely new (and purely subjective) standard that would render an intake questionnaire

a filed charge anytime the questionnaire purports to "communicate[ ] [the employee's] intent to activate the EEOC administrative process." Pet. App. 18a. Under this standard, it matters not that the EEOC never processed the form as a charge by docketing it, providing notice to the employer, and conducting an investigation. *Id.* at 39a. Nor does it matter that the EEOC never suggested to the employee that the form would be considered a charge. *Id.* Instead, all the employee would have to do is submit a questionnaire that contains "forceful tone and content," sufficient to alert the EEOC to the fact that the employee believes he or she has been the victim of discrimination. *Id.* at 19a.

This conflict in the courts of appeals, only deepened by the decision below, merits this Court's review. Accordingly, the Petition should be granted.

II. EXCUSING PLAINTIFFS' OBLIGATION TO EXHAUST ADMINISTRATIVE REMEDIES PREVENTS THE EEOC FROM DISCHARGING ITS STATUTORY DUTY TO INVESTIGATE AND CONCILIATE, WHILE ALSO UNDERMINING EMPLOYER EFFORTS TO RESOLVE CLAIMS INFORMALLY

A. The EEOC Cannot Fulfill Its Statutory Duty To Provide Notice To Employers And Conciliate Claims Of Employment Discrimination Where The Parties Claiming Unlawful Discrimination Are Permitted To Bypass The Charge Filing Process And Proceed Directly To Court

Congress expressly provided that individuals claiming a violation of the ADEA are required to exhaust administrative remedies by filing a charge of discrimination with the EEOC prior to initiating suit in federal court. 29 U.S.C. § 626(d). The important purpose behind this statutory requirement is to

provide "the EEOC with an opportunity to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance . . . ." Pet. App. 15a.

Accordingly, upon receipt of a charge of age discrimination, the EEOC must "promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(d). The legislative history of the ADEA confirms that Congress deliberately selected administrative resolution as the preferred means for resolution of employment discrimination claims:

> A condition precedent to the bringing of an action by an individual is that he must give the Secretary 60 days notice of his intention to do so. This is to allow time for the Secretary to mediate the grievance. It is intended that the responsibility for enforcement vested in the Secretary by Section 7 be initially directed through informal methods of conciliation and that the formal methods be applied only if voluntary compliance cannot be achieved.[3]

Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038 (5th Cir. 1977) (quoting 113 Cong. Rec. 31250 (Nov. 6, 1967)); *see also Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834, 841 (3d Cir. 1977) ("The thrust of the ADEA's enforcement provisions is that private lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor").

Congress made the same choice with respect to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Whenever a charge of discrimination is filed under Title VII, the EEOC statutorily is required to provide the employer-

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[3] Administrative enforcement responsibility was transferred from the Secretary of Labor to the EEOC in 1972.

respondent with notice of the charge and to investigate the allegations. 42 U.S.C. § 2000e-5(b). The purpose of this administrative scheme is to allow the EEOC "to settle disputes through conference, conciliation, and persuasion before the aggrieved party is permitted to file a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), this Court considered the question of whether an ADEA plaintiff forfeits his ability to pursue an action in federal court where he fails first to submit his claim to a state agency for administrative resolution. Noting the similarities between Title VII and the ADEA's enforcement schemes, the Court stated a clear preference for administrative resolution of discrimination claims, particularly those arising under the ADEA, observing that Congress "intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state [administrative] proceedings." *Id.* at 756 (citations and internal quotations omitted).

Accordingly, the EEOC is not merely a short stop to have one's ticket punched on the way to federal court. Rather, the EEOC's statutorily required efforts at "conciliation, conference and persuasion" form the cornerstone of enforcement of federal anti-discrimination laws. Where as here a plaintiff submits a completed intake questionnaire, but then files a lawsuit without first having taken care to ensure a proper administrative charge was filed, the exhaustion requirement is not satisfied. Moreover, the employer is deprived of statutorily required notice of the claim, and the EEOC is prevented from investigating and conciliating it.

Generally speaking, the EEOC's charge filing procedures are straightforward, and prospective claimants should be required to follow them. Under those procedures, "an intake questionnaire is not intended to function as a charge," because the purpose of a charge (unlike the intake question-

naire) is to: 1) notify the employer that a discrimination charge has been filed with the EEOC; and 2) initiate the EEOC investigation of the complaint. *Pijnenburg v. West Ga. Health Sys., Inc.*, 255 F.3d 1304, 1305-06 (11th Cir. 2001). Accordingly, "[t]o randomly treat [the] questionnaire as a charge would thwart these two objectives." *Id.* at 1306. Likewise, as the Seventh Circuit has observed, to recognize intake questionnaires "willy-nilly as charges would be to dispense with the requirement of notification of the prospective defendant, since that is a requirement only of the charge and not of the questionnaire." *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 80 (7th Cir. 1992).

It is apparent that the plaintiffs in this case viewed the EEOC as a brief obligatory stop along the way to litigation—a necessary evil rather than as Congress' preferred solution. An employer's first notice of a discrimination claim should never come in the form of a private lawsuit as it did here. A ruling by this Court is needed to make clear that exhausting administrative remedies by filing an EEOC charge is required before a lawsuit may be brought. Under the EEOC's procedures, filling out an intake questionnaire is not tantamount to "filing" a charge, except perhaps in the rare instance when the questionnaire both satisfies EEOC regulations concerning the sufficiency of charges and is actually *treated as a charge* by the agency, with prompt notice provided to the employer.

Nor is it necessary for courts to depart from this general rule to rescue an otherwise untimely claim that may have resulted from misinformation provided by the EEOC. The courts have long applied the doctrine of equitable tolling to excuse untimely filings directly attributable to the EEOC's neglect. *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75 (7th Cir. 1992); *Schlueter v. Anheuser-Busch, Inc.*, 132 F.3d 455 (8th Cir. 1998). Applying this doctrine in appropriate cases—rather than indiscriminately "deeming" an unprocessed, unserved intake questionnaire to be a charge—will

both help avoid unnecessary confusion over the status of an intake questionnaire and ensure that the doctrine of exhaustion is observed.

B. Waiving A Plaintiff's Obligation To File A Charge Would Unduly Hamper Employer Efforts To Address And Resolve Workplace Misconduct Without Resort To Litigation

The decision below essentially allows an age discrimination plaintiff to surprise the employer with an ADEA lawsuit, thereby robbing the employer of the opportunity to address workplace disputes without resort to expensive and time-consuming litigation. "The ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979)). As this Court observed in *McKennon*, "Congress designed the remedial measures in these statutes to serve as a spur or catalyst to cause employers to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of discrimination." *Id.* (citation and internal quotations omitted).

An employer managing an EEOC charge investigation has a strong interest in resolving the dispute early, not only to conserve resources but also to preserve the relationship between the company and the charging party, particularly if the individual is a current employee. Meaningful efforts to conciliate a discrimination charge by the EEOC, who is an "outsider" to the dispute, certainly serves the agency's aim of preventing and correcting alleged discrimination. Early resolution with the EEOC's assistance also may help to repair an employer-employee relationship that now may be merely strained, but may be destroyed irretrievably by the acrimony and scorched earth tactics of litigation. Timely processing

and resolution is especially important in age discrimination actions, where lengthy proceedings are "particularly prejudicial to the rights of 'older citizens to whom, by definition, relatively few productive years are left.'" *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 757 (1979) (citing 113 Cong. Rec. 7076 (1967)) (remarks of Sen. Javits).

Moreover, exhaustion serves the interest of the judiciary in preventing a log jam of employment discrimination suits that, if properly attended to by the EEOC, could be resolved successfully at the administrative level in an efficient and expeditious manner. Allowing ADEA plaintiffs to proceed to court without first having taken the appropriate steps to accomplish an actual charge filing will almost certainly lead to an increase in litigation and corresponding burden on the court system.

CONCLUSION

For the foregoing reasons, the *amici curiae* Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully request that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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